

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Order Instituting Rulemaking on the
Commission's Own Motion to Assess and Revise
the New Regulatory Framework for Pacific Bell
and Verizon California Incorporated.

Rulemaking 01-09-001
(Filed September 6, 2001)

Order Instituting Investigation on the
Commission's Own Motion to Assess and Revise
the New Regulatory Framework for Pacific Bell
and Verizon California Incorporated.

Investigation 01-09-002
(Filed September 6, 2001)

**ADMINISTRATIVE LAW JUDGE'S RULING REGARDING
PACIFIC BELL'S MOTION TO MODIFY THE SCHEDULE FOR PHASE 2**

This ruling denies Pacific Bell's (Pacific's) motion to modify the schedule for Phase 2. This ruling was made after consultation with the assigned Commissioner.

Background

In Phase 2 of this proceeding, the Commission will address factual issues related to (1) the audit of Pacific that was conducted by the Overland Consulting Group (Overland), and (2) how service quality has fared under NRF. Until recently, the schedule for Phase 2 was as follows:

Phase 2 Schedule	
Event	Date
Pacific and Verizon File Service Quality Compliance Reports	January 15, 2002
Overland Audit Report Submitted	February 22, 2002
Pacific Files Response to Audit Report	April 15, 2002
Parties Submit Surveys on Service Quality	April 15, 2002
Written Testimony	Opening Testimony: May 15, 2002 Reply Testimony: June 7, 2002
Motions to Strike	Motions to Strike: June 28, 2002 Replies to Motions: July 12, 2002
Evidentiary Hearings	July 22 – August 2, 2002
Briefs re: Phase 2 Issues	Opening Briefs: August 16, 2002 Reply Briefs: August 30, 2002
Draft Decision re: Phase 2	October 2002

The Overland audit report was submitted on February 21, 2002. The report alleges, among other things, that Pacific significantly overstated its costs for pensions, post-retirement benefits other than pensions (PBOPs), depreciation, and income taxes. These four issues could have a potentially large impact on Pacific's sharable earnings that would be refunded to ratepayers.¹ The report also alleges that Pacific repeatedly hindered and delayed the audit.

¹ Pacific reports that the four issues would result in a maximum sharing amount of \$128 million.

Pacific submitted its response to audit report on April 15, 2002. In general, Pacific denies that it overstated its costs or impeded the audit.

On April 24, 2002, the assigned Commissioner issued a ruling (ACR) that determined that it would be in the public interest to resolve the previously identified issues quickly so that any refund that might be owed to Pacific's customers could be paid as soon as possible. Conversely, if the allegations were found to be without merit, then Pacific would benefit from an early determination that no refund is required based on these allegations. The ACR also stated that the resolution of the previously identified issues could be accelerated if they were resolved before other Phase 2 issues. Accordingly, the ACR bifurcated the schedule for Phase 2.² Pursuant to the ACR, Phase 2A will address whether Pacific has misreported its costs for the following items:

² The ACR also determined that bifurcating Phase 2 has the added advantage of providing parties with the benefits of a Commission decision sooner about the largest financial issues raised by the audit report as they prepare for and litigate Phase 3.

Type of Cost	Amount of Alleged Misreported Cost	Relevant Portions of the Overland Audit Report
1. Pensions	\$357 million ¹	All of Chapter 7 except for those issues addressed in Sections VI, VII, and VIII.
2. PBOPs	\$528 million ¹	
3. Depreciation Reserve Deficiency	\$612 million ¹	All of Chapter 8 except for those issues addressed in Sections III.C, III.D, and III.E.
4. Income Tax Normalization Issues associated with (i) Items 1-3 above, and (ii) the Universal Service Fund	\$411 million ²	All of Chapter 9 except for those issues that are (i) addressed in Sections IV through VII, and (ii) associated with any item in Table 9-5 other than pensions, PBOPs, and depreciation reserve deficiency.

1. The amount of the cost shown in table does not include income tax effects, which would reduce the amount of the cost shown in the table.

2. Amount consists of the following items from Table 9-5 of the Overland audit report: \$167,589,000 (pensions) + \$39,878,000 (SFAS 106) + \$203,618,000 (Universal Service Fund). Amount does not reflect other possible effects of tax normalization issues that might be associated with Items 1-3 in the above table. These other possible effects are within the scope of Phase 2A.

Phase 2A will also address (1) whether the previously identified issues lead to sharable earnings, and (2) allegations that Pacific impeded the audit to the extent the allegations are raised in those parts of Chapters 7, 8, and 9 of the Overland audit report that address the previously identified issues. In Phase 2B, the Commission will address all other Phase 2 issues. The schedules for Phases 2A and 2B adopted by the ACR are as follows:

Phase 2A Schedule	
Event	Date
Written Testimony for Phase 2A Issues	Opening Testimony: May 8, 2002 Reply Testimony: May 17, 2002
Motions to Strike	Motions to Strike: May 21, 2002 Replies to Motions: May 23, 2002
Evidentiary Hearings	May 29 – June 5, 2002
Briefs re: Phase 2 Issues	Opening Briefs: June 14, 2002 Reply Briefs: June 21, 2002
Draft Decision re: Phase 2A	July 2002

Phase 2B Schedule	
Event	Date
Written Testimony for Phase 2B Issues	Opening Testimony: June 28, 2002 Reply Testimony: July 19, 2002
Motions to Strike	Motions to Strike: July 24, 2002 Replies to Motions: July 26, 2002
Evidentiary Hearings	July 31 – August 13, 2002
Briefs re: Phase 2 Issues	Opening Briefs: August 28, 2002 Reply Briefs: September 4, 2002
Draft Decision re: Phase 2	October 2002

On May 1, 2002, Pacific filed an "emergency" motion to modify the scheduled established by the ACR. Pacific states that the ACR does not provide Pacific with enough time to prepare its case. Pacific contends that in light of the

significant nature of the allegations in the Overland audit report, due process and fundamental fairness require that the schedule be modified to provide Pacific with adequate time to prepare its case. Pacific adds that it has already incurred significant harm directly attributable to the revised schedule, due to the significant disruption of preparation efforts, such as the need for witnesses to rewrite and refocus testimony. Pacific says that this harm will not be remedied by merely returning to the previous schedule. Accordingly, Pacific requests that the assigned Commissioner reconsider and modify the revised Phase 2 schedule to allow adequate time for Pacific to prepare. In the absence of such relief, Pacific requests that the full Commission consider and rule on its emergency motion.

On May 6, 2002, the Office of Ratepayer Advocates (ORA) filed a response opposing Pacific's motion. ORA states that the revised schedule provides Pacific with adequate time to study the auditors' report and to prepare its case.

Discussion

The crux of Pacific's argument is that the revised schedule for Phase 2 does not provide Pacific with sufficient time to develop and present its case. However, with respect to the bulk of the Phase 2 issues, the revised schedule actually provides Pacific with more time than the previous schedule. This can be seen by comparing the due dates for final briefs. Under the previous schedule, the due date for Phase 2 reply briefs was August 30, 2002. Under the revised schedule, the due date for Phase 2B reply briefs is September 4, 2002. Thus, the revised schedule established by the ACR provides parties with an additional five days to address most Phase 2 issues, not fewer days as Pacific suggests.

It is true that the revised schedule requires Pacific to file testimony on Phase 2A issues one week earlier than the previous schedule, and that other dates for Phase 2A events are also accelerated. However, the accelerated

schedule is more than offset by the major reduction in the number and scope of issues in Phase 2A. For example, the previous schedule called for all issues pertaining to the Overland audit report and service quality to be addressed by the parties in testimony filed on May 15, 2002. This is no longer the case. Under the revised schedule, most audit issues as well as all issues pertaining to service quality will be addressed in Phase 2B. In contrast, Phase 2A will focus on just a handful of issues contained in three of the 21 chapters of the Overland audit report. Moreover, even though the handful of issues to be addressed in Phase 2A have the largest potential financial impact, the large number of issues reserved for Phase 2B may be even more complex and contentious, particularly issues pertaining to the quality of service provided by the two largest telephone companies in the State. Furthermore, Pacific appears to be far along in its preparations for Phase 2A issues. In its initial response to the Overland audit on April 15, 2002, Pacific provided a detailed rebuttal to allegations that Pacific misreported its costs for pensions, PBOPs, depreciation, and income taxes, the very issues to be addressed in Phase 2A. This detailed rebuttal indicates that Pacific will be adequately prepared to litigate Phase 2A issues.

For the preceding reasons, Pacific has not shown that it would be harmed by the revised schedule for Phase 2 set forth in the ACR. Accordingly, Pacific's motion to modify the schedule for Phase 2 is denied.

In the event its motion is denied, Pacific asks the full Commission to consider and rule on its motion. To address this request, it is helpful to first review the authority under which the ACR was issued. Rule 63 of the Commissions Rules of Practice and Procedure (Rules) states:

The presiding officer may set hearings and control the course thereof; administer oaths; issue subpoenas; receive evidence; hold appropriate conferences before or during hearings; rule

upon all objections or motions which do not involve final determination of proceedings; receive offers of proof; hear argument; and fix the time for the filing of briefs. The presiding officer may take such other action as may be necessary and appropriate to the discharge of his or her duties, consistent with the statutory or other authorities under which the Commission functions and with the rules and policies of the Commission.

The ACR was clearly issued pursuant to authority granted by Rule 63.³ There is no provision in the Public Utilities Code or in the Commission's Rules that permits an interlocutory appeal of a presiding officer's ruling. Moreover, it is well established that interlocutory appeals of presiding officers' rulings on procedural matters are disfavored by the Commission:

[T]oday's decision is a rare occurrence in that we are reviewing a ruling made by an ALJ before we have considered the merits of the entire proceeding. Normally, we are reluctant to review evidentiary and procedural rulings before the proceeding has been submitted . . . Our reasoning for that has been expressed previously:" (D.94-08-028, 55 CPUC 2d 672, 676.)

There is no appeal from a procedural . . . ruling of a presiding officer prior to consideration by the Commission of the entire merits of the matter. The primary reasons for this rule are to prevent piecemeal disposition of litigation and to prevent litigants from frustrating the Commission in the performance of its regulatory functions by inundating the Commission with interlocutory appeals on procedural and evidentiary matters. (Id., quoting D.87070.)

Parties who contemplate appealing a ruling with which they are dissatisfied should recognize that we frown on such practice, and view this kind of decision as the rare exception rather than the rule. (Id.)

³ See also Ordering Paragraph 4 of R.01-09-001/I.01-09-002 (the assigned Commissioner and the assigned ALJ may revise the schedule for this proceeding).

In a 1998 decision, the Commission observed that its presiding officers, “of necessity, must have the authority to pass on discovery motions and impose sanctions for discovery abuse.” The Commission once again quoted from D.87070, and went on to note there is an additional basis for disfavoring interlocutory appeals:

[W]e have a further reason to assure the presiding officer adequate power to control a hearing. We now have to decide, with few exceptions, adjudicatory cases within 12 months of filing and other matters within 18 months. An impotent presiding officer faced with an intransigent litigant could not manage the case expeditiously, resulting, perhaps, in actual harm to other participants. (D.98-03-073, *mimeo.*, p. 126.)

The Commission revisited this topic yet again in 2000 when it affirmed an ALJ’s ruling regarding an applicant’s request for a protective order:

Before turning to the merits of this case, we remind SCE that our Rules clearly state that the presiding officer has authority to rule upon ‘all objections or motions which do not involve final determination of proceedings.’ (Rule 63.) Through these Rules, the Commission has delegated the authority to make procedural rulings to the presiding officer in each proceeding. The Commission has articulated its reluctance to review evidentiary and procedural rulings before the proceeding has been submitted. While noting that interlocutory appeals from ALJ Rulings on procedural matters are not absolutely barred, the Commission has consistently expressed reluctance to consider them. (D.00-05-018, *mimeo.*, p. 5.)

Thus, in rare and extraordinary circumstances, presiding officers may exercise their discretion to refer procedural matters to the Commission, and the Commission may exercise its discretion to consider interlocutory appeals of

presiding officer rulings on such matters.⁴ However, the circumstances here are not extraordinary, and they do not justify granting an exception to the rule disfavoring interlocutory appeals.

Therefore, **IT IS RULED** that Pacific Bell's motion filed on May 1, 2002, to modify the schedule for Phase 2 of this proceeding is denied.

Dated May 7, 2002, at San Francisco, California.

/s/ TIMOTHY KENNEY

Timothy Kenney
Administrative Law Judge

⁴ For example, in D.94-08-028 (55 CPUC 2d 672), the Commission addressed a novel issue of whether an association could be compelled to answer a data request with respect to the association's individual members, or to require the individual members to respond. The Commission explicitly stated that it was granting an exception to the interlocutory appeal rule "because of possible ramifications the [ALJ's] ruling could have in other proceedings where an association is a party to the proceeding." (Id., 676.) In D.96-05-034 (66 CPUC 2d 247), the Commission took up an appeal of a procedural ruling where resolution of the procedural schedule depended on a statutory interpretation (Pub. Util. Code § 709.5 required the Commission to establish rules and regulations at issue in the proceeding by a certain date).

CERTIFICATE OF SERVICE

I certify that I have by mail this day served a true copy of the original attached Administrative Law Judge's Ruling Regarding Pacific Bell's Motion to Modify the Schedule for Phase 2 on all parties of record in this proceeding or their attorneys of record.

Dated May 7, 2002, at San Francisco, California.

/s/ ERLINDA PULMANO

Erlinda Pulmano

N O T I C E

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